

**UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT**

INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION,
INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION
LOCAL 4, and INTERNATIONAL
LONGSHORE AND WAREHOUSE
UNION LOCAL 8,

Petitioners,

v.

THE NATIONAL LABOR
RELATIONS BOARD,

Respondent.

No.

PETITION FOR REVIEW

The International Longshore and Warehouse Union, International Longshore and Warehouse Union Local 4, and International Longshore and Warehouse Union Local 8 (hereinafter “the Petitioners” or “the Unions”) hereby petition the court for review of the Order of the National Labor Relations Board (“NLRB”), entered on March 26, 2015, in case 19-CC-111986, attached hereto.

Specifically, the Petitioners assert that they are aggrieved by, and therefore ask this court to review, the following portions of the Order:

- 1) Where the NLRB affirmed the administrative law judge's findings that the Petitioners violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.
- 2) Where the NLRB acknowledged the evidence establishing that Kadoke Marine Management (Kadoke) was an ally of the primary employers for picketing purposes, but failed to reverse the administrative law judge's ruling that Kadoke was not an ally of the primary employers.

RESPECTFULLY SUBMITTED this 7th day of May, 2015.

s/Robert Lavitt

Robert Lavitt, WSBA# 27758

s/Laura Ewan

Laura Ewan, WSBA# 45201

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2015, I electronically filed the foregoing Petition for Review with the court, and caused a true and correct copy of the same to be delivered via UPS Overnight mail to:

Richard F. Griffin, Jr., General Counsel
National Labor Relations Board
1099 14th St. NW
Washington, D.C. 20570

Ronald Hooks, Regional Director
National Labor Relations Board, Reg. 19
2948 Jackson Federal Building
915 2nd Avenue
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DATED: May 7, 2015.

s/Robert Lavitt
Robert Lavitt, WSBA # 27758

Attachment

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

International Longshore and Warehouse Union, International Longshore and Warehouse Union, Local 4, and International Longshore and Warehouse Union, Local 8 and Tidewater Barge Lines, Inc. Case 19–CC–111986

March 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On April 25, 2014, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and

¹ The Respondents' exception that the Board lacked a quorum at the time it announced the appointment of Ronald K. Hooks as Regional Director for Region 19, and that consequently the Notice of Hearing must be quashed and the complaint dismissed, is without merit. Although Regional Director Hooks's appointment was announced on January 6, 2012, the Board approved the appointment on December 22, 2011, at which time it had a quorum. See *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker . . . was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

² In affirming the judge's findings that the Respondents violated Sec. 8(b)(4)(i) and (ii)(B), we find it unnecessary to pass on whether Kadoke Marine Management is an ally of the primary employers United Grain Corporation (UGC) and Columbia Grain International (CGI). Notwithstanding the alleged ally relationship with Kadoke, the record fully supports the judge's finding that the Respondents' picketing specifically targeted another, undisputedly neutral employer, Tidewater Barge Lines, Inc. (Tidewater), and was aimed at coercing Tidewater to cease doing business with UGC and CGI. Specifically, the Respondents moved their picket boats into place when Tidewater tugboats approached the water-based spud barges transporting grain for UGC and CGI; they specifically blocked Tidewater's tugboats from approaching the spud barges; and the picketers yelled at Tidewater's tugboat employees to turn their tugboats around and go back to the dock. The Respondents' conduct evinces an unlawful secondary object to enmesh neutral Tidewater in the Respondents' primary labor dispute with UGC and CGI. See *Electrical Workers IBEW Local 970 (Interbox America)*, 306 NLRB 54, 58 (1992); *Truck Drivers, Chauffeurs & Helpers Local No. 100, Teamsters*, 250 NLRB 1201, 1203 (1980) ("[I]t is clear that Respondent sought to enmesh neutral employers in its [primary] dispute.").

to adopt the recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondents, International Longshore and Warehouse Union, International Longshore and Warehouse Union, Local 4, and International Longshore and Warehouse Union, Local 8, San Francisco, California, Vancouver, Washington, and Portland, Oregon, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Engaging in, or inducing or encouraging any individual employed by Tidewater Barge Lines, Inc. or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any

Chairman Pearce joins his colleagues in affirming the judge's finding of a violation. However, contrary to the judge, he would find that Kadoke Marine Management is an ally of the primary employers and that the Respondents' picketing of Kadoke was lawful. In finding Kadoke is an ally, the Chairman relies on the facts that: Kadoke was created during the labor dispute; the primary employers were its only customers; the primary employers requested that Tidewater charter a tugboat to Kadoke, which Tidewater did (in addition to bareboat chartering grain barges to Kadoke); Kadoke's use of the tugboat was limited to shuttling barges for the primary employers; the primary employers were the guarantors of the bareboat charters for Kadoke; and the bareboat charter was to cease upon resolution of the primary labor dispute, with Tidewater to resume operation of the vessel at that time. The Chairman distinguishes these facts from *General Teamsters Local 959, State of Alaska v. NLRB*, 743 F.2d 734 (9th Cir. 1984), on which the judge relied, because here, unlike in *General Teamsters*, there is no evidence that Kadoke served other shippers during the period of the dispute. Moreover, whereas in *General Teamsters* the primary employer had no legal relationship to or oversight over the purported ally's tugboat, here, the primary employers instigated Kadoke's bareboat charter and served as its guarantors. The Chairman finds that because Kadoke came into being in the midst of the primary dispute, see *Advance Electric*, 268 NLRB 1001, 1004 (1984), enfd. 748 F.2d 1001 (5th Cir. 1984), cert. denied 470 U.S. 1085 (1985), and its operations were tailored to the primary employers' needs to the exclusion of all else (as evidenced by the fact that the primary employers arranged the bareboat charter agreement between Tidewater and Kadoke), Kadoke was an ally of the primary employers. Analyzing the picketing of ally Kadoke under the standard set forth in *Sailors Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950), the Chairman would find it lawful. Thus, Kadoke was engaged in its normal business at the spud barge when the picketing of it occurred, the picketing clearly disclosed that the dispute was with the primary employers, and the picketing was reasonably close to the situs of the Respondents' dispute with Kadoke at the spud barges.

³ We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

services, where an object thereof is to force or require Tidewater Barge Lines, Inc. or any other neutral person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, United Grain Corporation and Columbia Grain International.

(b) Threatening, coercing, or restraining Tidewater Barge Lines, Inc. or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Tidewater Barge Lines, Inc. or any other neutral person engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, United Grain Corporation and Columbia Grain International.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at their business offices and meeting halls copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees and members by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, return to the Regional Director for Region 19 signed copies of the notice in sufficient number for posting by Tidewater Barge Lines, Inc., if willing, at all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. March 26, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in, or induce or encourage any individual employed by Tidewater Barge Lines, Inc. or by any other person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Tidewater Barge Lines, Inc. or any other neutral person engaged in commerce or in an industry affecting commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, United Grain Corporation and Columbia Grain International.

WE WILL NOT threaten, coerce, or restrain Tidewater Barge Lines, Inc. or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Tidewater Barge Lines, Inc. or any other neutral person engaged in commerce to cease using, selling, handling, transporting, or

otherwise dealing in the products of, or to cease doing business with, United Grain Corporation and Columbia Grain International.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 4, AND INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 8

The Board's decision can be found at www.nlr.gov/case/19-CA-111986 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Susannah C. Merritt, Esq., for the General Counsel.
Robert H. Lavitt, Esq. and Laura Ewan, Esq. (Schwerin, Campbell, Barnard, Iglitzin & Lavitt, LLP), for the Respondent.
Michael T. Garone, Esq. (Schwabe, Williamson & Wyatt), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Portland, Oregon, on January 14-16, 2014. Tidewater Barge Lines, Inc. (the Charging Party or Tidewater), filed the charge on August 26, 2013,¹ and the General Counsel issued the complaint on September 18, 2013. The International Longshore and Warehouse Union, International Longshore and Warehouse Union Local 4, and International Longshore and Warehouse Union Local 8 (hereinafter the Respondents,² ILWU, or the Union) filed a timely answer denying all material allegations and setting forth affirmative defenses.

The parties filed closing briefs, as scheduled, on March 28, 2013. For reasons discussed below, on April 9, the General Counsel filed a motion to strike certain of the Respondent's defenses and, in the alternative, a request to file a supplemental brief. The submission included the supplemental brief, which is admitted into the record. The Respondent requested an opportunity to respond, and the response, which is also admitted into the record, was received on April 24.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (the Act).³ The Charging Party, a state of Oregon Corporation, with an office and place of business at the Port of Portland in Portland, Oregon, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (the Act) by picketing at Tidewater's facilities in Wilma, Washington, Central Ferry, Washington, and Hayden Island, Oregon, on various dates since August 19, 2013.

A. Procedural History

On September 20, 2013, the General Counsel filed a petition for preliminary injunctive relief under Section 10(1) of the Act in U.S. District Court. The Respondent filed a response on October 2. On October 15, U.S. District Court Judge Ann Aiken issued an opinion and order granting the General Counsel's petition and enjoining the ILWU from further picketing Tidewater. On October 21, the General Counsel filed a petition for contempt, and on October 31, Judge Aiken found the ILWU was in contempt of her October 15 order. At Tidewater's request, I take administrative notice of documents pertaining to the injunctive proceedings under Section 10(1) of the Act.

B. Background

1. The grain companies and ILWU labor dispute

Grain companies in the Pacific Northwest have long employed grain handlers from the ILWU. A labor dispute arose between the ILWU and two of the grain companies, United Grain Corporation (UGC) and Columbia Grain International (CGI).⁴ UGC is owned by Mitsui & Co., and CGI is owned by Marubeni Corporation, both of which are Japanese corporations.⁵ UGC and CGI have been Tidewater's customers for about 25 years. Both companies have large export terminals on the Columbia River, which creates the border between Washington and Oregon. UGC's export terminal is on the Washington side of the river in Vancouver. CGI's export terminal is on the Oregon side at the Port of Portland, Terminal 5. Both UGC

³ The ILWU's attorney requested I reconsider my denial of its motion to correct the pleadings, which I hereby decline for the reasons originally articulated at the hearing.

⁴ This labor dispute is the topic of various pending litigation. Its underlying details are not relevant to my determinations here.

⁵ I refer to UGC and CGI as the "grain companies" in this decision. When I am discussing other grain companies, they are named and/or distinguished as companies other than UGC or CGI.

¹ All dates are 2013, unless otherwise indicated.

² I refer at times to the Respondent in the singular but recognize that three related entities are named.

and CGI also have smaller elevators along the Snake River, which empties into the Columbia River and runs along the border between Washington and Idaho. Grain is transported by barge and rail from the smaller elevators to the larger export terminals.

The grain handlers' responsibilities include unloading grain from barges and performing maintenance and repair at the grain elevators. They do not operate tugs or tow barges.

Following failed contract negotiations between the ILWU and both grain companies, they each declared impasse. UGC declared impasse on February 27, 2013, and locked out the Union. CGI followed suit, locking the Union out on May 4.

2. Tidewater's operations

Tidewater's primary business consists of transporting commodities up and down the Columbia and Snake Rivers using tugs and barges. Tidewater's administration building, located in Vancouver, Washington, houses its administrative offices. The Tidewater industrial center,⁶ also in Vancouver, is comprised of a dry dock and some maintenance barges. All vessels are serviced there. The empty barges are also sometimes transported via tug to Tidewater's maintenance facility in Vancouver.

Bob Curcio is Tidewater's chief executive officer and Bruce Reed is vice president and chief operating officer. Geoff Doerfler, the dispatch and logistics manager, reports to Reed. Brian Fletcher is Tidewater's port captain. He reports to Craig Nelson, vessel operations manager.

A tug has four or five crew members, consisting of a captain, pilot, and two or three deck mechanics. The captain is responsible for operating the vessel and the pilot is responsible for navigation. The deck mechanics take care of the vessel, make and break tows, cook, and clean up. There are two shifts for the crewmembers: the first shift works the first 15 days of the month and the second shift works from the 16th to the last day of the month. While on the vessel, two sets of crewmembers work rotating 6-hour shifts.

Tidewater has about 240 employees, including its roughly 120–140 crew members. The crewmembers are represented by the Inland Boatman's Union (IBU), which is the marine division of the ILWU. Tidewater has a collective-bargaining agreement (CBA) with the IBU. Rule 26 of the CBA provides:

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an Employee refuses to enter upon any property involved in a primary labor dispute or refuses to go through or work behind any primary picket line including the primary picket line of Union party to this Agreement and including primary picket lines at the Employer's places of business.

(GC Exh. 2.)⁷

⁶ This is sometimes referred to in the transcript as the TIC.

⁷ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondents' exhibit; "GC Br." for General Counsel's brief; "CP Br." for the Charging Party's brief; and "R. Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and con-

The main commodities Tidewater transports are grain and petroleum, each of which comprises about 40 percent of its total business. Tidewater also transports export containers, solid waste containers, fertilizer, chemicals, and wood products. Commodities are loaded onto the barges, which are then pushed by tugs. Tidewater owns 11 of its tugs and leases the remainder from financial institutions. At the time period relevant to the instant case, Tidewater possessed 16 tugs, but only operated 13. Tidewater owns about 80 percent of its barges and leases the remainder from financial institutions. During the relevant time period, Tidewater operated about 182 barges, 62 of which were grain barges. Some of the grain barges were chartered to other companies, as detailed below.

Tugs usually transport four barges latched together. The barges generally carry mixed commodities among them, and some may be empty. When it is time for the barges to separate they go temporarily to a tie-off location, which can take a couple different forms. One such tie-off is called a "spud barge" which is essentially a floating dock. Other tie-offs include a "beach barge" which consists of two barges tied end-to-end and secured to the shore with ropes and wires. The barges are secured to the tie-off and separated when a barge needs to be delivered or "spotted" to a customer. When barges are spotted to a grain customer, they are tied to a "dolphin" which is a steel structure used for loading the grain.

Tidewater has three spud barges near the Port of Portland, referred to as Hayden Island upper, middle, and lower. CGI's grain export facility at Terminal 5 in Portland is about 2.5 miles from Hayden Island lower, 3 miles from Hayden Island middle, and 4.5 miles from Hayden Island upper. UGC's grain facility in Vancouver is about 2.5 miles from Hayden Island lower, 2 miles from Hayden Island middle, and .5 mile from Hayden Island upper. Tidewater's grain barges headed for CGI or UGC are concentrated at the Hayden Island upper spud barge.

In Wilma, Tidewater owns a spud barge which sits next to a petroleum tank farm that is out of operation. Tidewater's spud barge is about a mile downriver from CGI's Wilma grain elevator, and the two facilities are not visible from each other.⁸ Tidewater uses the Wilma spud barge to build tows for a variety of different customers. (Tr. 189–195.) Finally, Tidewater has a beach barge in Central Ferry, approximately a mile from CGI's Central Ferry grain elevator.

3. Grain transportation

Tidewater transports grain for several companies, including CGI, EGT, Kalama Export, UGC, Louis Dreyfus, Lewis & Clark, CHS and TEMCO. Though there are fluctuations, CGI and UGC each comprise about 20 percent of Tidewater's grain business. Grain is hauled year-round, but the busiest time is harvest season, which runs from July through October or November. Within that period, August through the first week of September is busiest. The barges Tidewater uses to haul grain are uniquely designed to haul only grain and they are built specifically for the Columbia and Snake River system.

clusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

⁸ It takes about 37–40 hours to take a tow from Wilma to the Portland/Vancouver area.

Grain is stored in the various grain companies' elevators until it is ready to be transported downriver toward Portland. The grain companies notify Tidewater's dispatchers when they want a load transported, and the dispatchers manage the fleet to meet the customers' needs. Tidewater uses a tug to deliver an empty barge to the elevator. Grain handlers, employed by the grain companies, load the barge, which takes about 6–7 hours.⁹ Usually the tug leaves so that its crew can attend to other work while the barge is loading, and a different tug picks up the loaded barge. The loaded barge then goes to a tie-off and hooks up with other barges to proceed downriver toward the Port of Portland. Once the barges have arrived downriver, they go to the grain companies' export elevators. They are unloaded and then transported back to the Hayden Island spud barge where they are then hooked up with other barges for transportation upriver.

The barges sometimes store the grain until it is ready to be unloaded at the grain companies' facilities.

C. Bareboat Charter Agreements

As harvest season approached, UGC and CGI asked Tidewater if it would charter a tug to Kadoke Marine Management (Kadoke), a company created in the summer of 2013.¹⁰ On August 1, Tidewater and Kadoke entered into an agreement for Tidewater to bareboat charter the tug *Invader* to Kadoke.¹¹ Under a bareboat charter, the owner retains ownership but relinquishes operation and maintenance of the tug to the charterer. Pursuant to the terms of the agreement, the bareboat charter would cease and the Tidewater would resume operation of the *Invader* if the labor situation between the ILWU and the grain companies resolved. The charter required that the *Invader* would be used only for shuttling barges between the grain companies (UGC and CGI) and Tidewater's spud barges. (R. Exh. 2.)

The same day, August 1, Tidewater bareboat chartered barges under these same basic terms. Under the agreement, Tidewater bareboat chartered to Kadoke loaded grain barges that were tied off at Hayden Island upper. Though not specified under the agreement, Kadoke was to transport the barges to UGC or CGI for discharge. The barge remained Kadoke's responsibility until a Tidewater tug reconnected to it. (R. Exhs. 4–7; Tr. 272–282.) A services agreement between Kadoke and the two grain companies, entered into on July 26, 2013, set forth the terms of service in detail. The agreement gave UGC and CGI significant control over the scope of services Kadoke was to provide as well as control over budget and funding con-

cerns, including the right for the grain companies to audit Kadoke's books. (R. Exh. 12.)

Tidewater undertook similar actions upriver by bareboat chartering the tank *Stacy T* and some of its barges to JT Marine for use between CGI's upriver terminals and Tidewater's tie-offs in Central Ferry and Wilma. (R. Exh. 3; Tr. 269–270.) Under the bareboat charter agreement, JT Marine had the *Stacy T* pick up a barge at Tidewater's upriver tie-offs and transport it to the CGI grain elevators in Wilma and Central Ferry for unloading. Once loaded, JT Marine transported the barge back to Tidewater's upriver spud barge and beach barge to connect with other barges for transportation downriver. The bareboat charter ended once a Tidewater tug connected to the loaded barge. The Tidewater tug then transported the grain downriver as part of a larger load. When the loaded barges arrived downriver, they were tied off at the Hayden Island spud barges. Then, the barges headed for the UGC and CGI grain company facilities in Vancouver and Terminal 5, respectively, were be picked up by the *Invader* and transported to the grain companies for discharge. The *Invader* then transported the empty grain barges back to the spud barge. The bareboat charter ceased when a Tidewater tug arrived at the spud barge to inspect the empty barge and take it for redelivery.

CGI and UGC, Kadoke's only customers, were the guarantors of the bareboat charters to Kadoke. CGI was guarantor of the bareboat charters to JT Marine. (R. Exhs. 7–9; Tr. 311–313.)

Under the charter agreements, Kadoke and JT Marine were required to provide security for the chartered vessels, but Tidewater did not pay for the security. (Tr. 273–274; R. Exh. 4.)

The *Invader* is noticeably different from Tidewater's other tugs because it displays a different color scheme. Between July and October 2013, the *Invader* was present around Tidewater's Hayden Island upper spud barge. In October, Reed ordered Kadoke to find another moorage based on his belief that the *Invader* was drawing picketing activity.

Bradley Clark, a Local 4 executive board member and caucus delegate, maintained a computer log tracking grain barges. He compiled it through communications with the vessels out on the river. Toward the beginning he updated it daily because there was a lot of barge movement. When things slowed down, he updated it a couple times a week. At some point in time, each of Tidewater's barges was bareboat chartered. (Tr. 299; R. Exhs. 5–6.)

D. Picketing Activity

Shortly following the lockouts, the ILWU began picketing at UGC and CGI's downriver facilities near Portland, including waterborne picketing using small boats.¹² Local 4 and Local 8 coordinated picketing efforts. In August, IBU National President Alan Cote sent a letter to all IBU members advising them that if they were confronted with an ILWU picket line they should honor it. (GC Exh. 10.) As a result of Tidewater's IBU-represented crews' decision to honor the ILWU's picket lines, Tidewater was unable to access UGC or CGI's facilities

⁹ On a few vessels used only during harvest season, a Tidewater employee opens the hatches when the barge comes to a grain facility.

¹⁰ Dodge, the IBU's regional director, contends that Reed, Nelson, and Sheryl Blunck discussed bareboat chartering to the grain companies. (Tr. 346–347.) Reed denies this. (Tr. 453.) Resolution of this conflicting testimony is unnecessary for me to render my decision, as I rely on evidence of the charters themselves rather than Dodge's recollection of what was conveyed in meetings.

¹¹ Tidewater Holdings is listed as the owner on this agreement. Tidewater Barge Lines and a smaller company called Tidewater Terminal Company comprise Tidewater Holdings. (Tr. 264.)

¹² This picketing at the grain facilities is not at issue in this case.

to deliver grain barges. As harvest season continued, this had a significant effect on Tidewater's business.

On August 8, 2013, Randal Olstad, regional manager for CGI's Pacific Northwest region, received a call informing him that there was picketing activity at CGI's Central Ferry facility. He called the Central Ferry location and was told there was a picket boat by CGI's dolphin load cell. Shortly after 3 p.m., Olstad and Rick Thompson, the warehouseman at Central Ferry, took photographs of the picketing activity. Thompson observed a roughly 20-foot aluminum boat anchored about 15 to 20 yards from the dolphin. There were two men inside it holding up two signs that said, "Columbia Grain, Unfair, Locked out, An Injury to One is an Injury to All." At about 8 that evening, Olstad saw a similar picket boat anchored in front of the dolphin at the Port of Wilma. There were two men holding up the same signs. CGI was not able to load grain into barges because Tidewater's captains, who were to deliver the empty barges, honored the picket lines. (Tr. 84-90.)

On August 19, there was another picket at the Port of Wilma. The tug Stacy T picked up loaded barges from CGI's Wilma facility. At about 6 p.m., an ILWU picket boat followed the Stacy T from CGI's Wilma elevator to Tidewater's Wilma spud barge and stayed there as the barges were moored. Olstad observed that when a Tidewater tug later came to pick up barges, the picket boat moved to position itself between the tug and the spud barge. Another Tidewater tug tried to pick up the barges a couple hours later but the same thing occurred. When the second tug abandoned its efforts to pick up the barges, the picketers returned to CGI's Wilma grain elevator. The picket boat was the same boat Olstad saw on August 9, with the same signs. (Tr. 92-96.)

Picketing began early the morning of August 23 in Wilma. A blue and white ski boat was anchored by the Tidewater dock. A picketer held up a sign stating the same things as the previous signs. Shortly before 9 a.m., a Tidewater tug approached to pick up the loaded barges. The picket boat moved to position itself between the tug and the loaded barges. The tug did not cross the picket line to pick up the barges. (GC Exhs. 6-7; Tr. 97-99.)

The previous evening, August 22, Larry Bartel was captain of the tug Hurricane, which was headed toward Lewiston, Idaho with three empty grain barges to deliver to Lewis & Clark Grain Company. When he was going by CGI at Central Ferry, he received a call from an ILWU picket boat telling him they had an active picket at the Central Ferry tie-off. He also said they were camping at a local campground waiting for Tidewater's boats to show up. Bartel responded that he wasn't going to Central Ferry, and he proceeded up to Lewiston without incident.

On August 23, after the Hurricane's crew unloaded the barges in Lewiston, they received an assignment to go to the Wilma tie-off to pick up loaded grain barges and take them to Vancouver. Bartel did not know whose grain was loaded in the barges and he did not know what facility the barges were being taken to in Vancouver. As he approached Wilma, there was an ILWU picket boat going back and forth along the moored barges. Bartel saw signs that said ILWU Local 4 but could not read the smaller print. He moved an empty grain barge to make

room for his tow, and then went back to pick up one of the loaded barges. As he approached it, the picket boat moved between the tug and the loaded barge. Bartel attempted to go to the other end of the barge, but the picket boat positioned itself to remain between the tug and the barge. He was unable to pick up any grain barges. The Hurricane was dispatched back up to Lewiston to pick up some loaded grain barges. When they headed back downriver, there was another picket boat at the Wilma facility with signs that said ILWU Local 4 and some other smaller print that Bartel could not read. (Tr. 179-87.)

As the Hurricane approached Portland on August 26, Bartel had a full tow consisting of two full grain barges, an empty petroleum barge, and an empty chip barge. He saw two picket boats at Hayden Island upper going back and forth about 150-200 feet from the barges. A sailboat was anchored between Haden Island upper and Hayden Island middle. The sailboat had signs identifying itself as ILWU and stating they were locked out from Columbia Grain. The Hurricane was dispatched to pull an empty barge out of Hayden Island middle. A boat was parked at the beach nearby, and as Bartel hooked the grain barge and started to move, the boat started going across in front of him between Hayden Island upper and Hayden Island middle towards the sailboat. Bartel and his crew took the empty barge to the Tidewater maintenance facility in Vancouver.

The tug Betty Lou was dispatched on August 23 to pick up empty grain barges at Hayden Island middle. Fletcher rode along to document any problems. A small boat with ILWU signs kept pace with the Betty Lou on its starboard side. Another boat with two ILWU Local 4 signs and two ILWU signs depicting "LOCKED OUT UGC UNFAIR" and "UGC UNFAIR LOCKED OUT" was anchored below the tie-off at Hayden Island middle. Fletcher videotaped what he saw from the Betty Lou's wheelhouse. As the Betty Lou approached, a picketer stated, "This is a bona fide picket line of the ILWU. We are picketing these barges of Columbia Grain, United Grain."¹³ "Turn yourselves around and go back to the dock."¹⁴ "This is a bona fide picket line of the ILWU. Turn yourselves around and go back to dock."¹⁵ "Scabs touched these barges. 'Shame on Japan, shame on UGC.'¹⁶ "Run these scabs off our river."¹⁷ "This is a bona fide picket line of the ILWU. These barges have been touched by non-union labor in a hostile work environment caused by United Grain, Marubeni, Columbia Grain, Mitsui Japan, United Grain. This is a bona fide picket line of the ILWU."¹⁸ The crew turned the Betty Lou around and headed back to the dock without collecting any barges.

On September 13, Fletcher rode the tug Rebel to Hayden Island upper to pick up empty grain barges. About 14 empty barges were tied to the spud barge. (Tr. 161-162.) A fishing boat and a sailboat with its sails down were anchored below the barges. The fishing boat had a yellow sign with blue lettering, stating, "ILWU Local 4"; "An Injury to One is an Injury to All"

¹³ GC Exh. 8 at 2:50-3:10.

¹⁴ Id. at 3:20-3:22.

¹⁵ Id. at 3:28-3:35.

¹⁶ Id. at 3:40-3:47.

¹⁷ Id. at 3:55-3:57.

¹⁸ Id. at 4:00-4:27.

on its starboard side window. On the port side there was a sign saying “We Support ILWU” in the front window and a sign saying “ILWU Local 4”; “An Injury to One is an Injury to All”; “Locked Out.” The sailboat had a sign stating, “ILWU Local 4”; “An Injury to One is an Injury to All”; “Locked Out”; and “ILWU Local 4”; “An Injury to One is an Injury to All”; “UGC Unfair”; on the port side of the boat. The starboard side had a sign stating “ILWU”; “An Injury to One is an Injury to All”; “Locked Out.” There were three tugs tied to the Hayden Island upper spud barge: the *Invader*, the *Washington*, and the *Daniel Foss*. (GC Exh. 9.) Tidewater owns the *Invader* but not the *Washington* or the *Daniel Foss*. Normally other company’s tugs do not tie up at Hayden Island Upper. Reed understood that the *Washington* and *Daniel Foss* were bareboat chartered to Kadoke Marine from Shaver and Foss Maritime, respectively, to do ship assist work for CGI and UCG.¹⁹ The tug crew did not cross the picket line to pick up the barges. (Tr. 134.)

On October 16, Fletcher and Doerfler rode the tug *Captain Bob*, which had been dispatched to pick up an empty grain barge at Hayden Island upper at about 5:30 p.m. Doerfler videotaped this attempt. A sailboat was anchored toward the Oregon side of the tie-off. A fishing boat was anchored behind the barges. Another small boat was not anchored. The boats had signs similar to the previous ones. As the tug got closer, the fishing boat pulled in front of the *Captain Bob*, blocking its path to the barges. The tug had a sign that said “ILWU”; “UGC Unfair Locked Out.” A passenger from a picket began shouting, though the audio from the videotape footage is partially indecipherable. A passenger can be heard shouting, a few times, “This is an ILWU picket line” and “This is a bona fide picket line of the ILWU.” Fletcher also heard a passenger from the anchored vessel shout “Fuck you” and the videotape confirms this.²⁰ Fletcher recalled the picketer also stated, “Go back to your dock.” He heard verbiage about scab barges and scab labor, which the videotape also captured.²¹ This was followed by, “They’re coming after you next” and something about “Japanese grain.”²² One of the picketers also says, “They illegally locked us out”;²³ and “What are they going to do to you next?”²⁴ The captain attempted to go to the head of the spud barge to try to pick up the barge, but the boat followed alongside, positioning itself between the tug and the barges. As the tug made its approach to go in above the tie-off, the boat pulled in front of the tug and blocked its path. The small boat that had been anchored picked up its anchor and started coming toward the tug. At that point, the Coast Guard came over and asked if they would be making another attempt to pick up the barge. The captain responded that they would not, and the tug turned around and went back to the dock without picking up any barges. (Tr. 134–141; GC Exh. 11.)

The plan for the empty barges be picked up at Hayden Island upper on the dates set forth above was put them with other

barges to transport upriver for reloading at Tidewater’s various grain company customers’ facilities. (Tr. 165–168.)

At around 7 a.m. on October 17, Olstad received word that Tidewater tug was going to try to pick up some loaded barges at the Wilma spud barge. He went to the spud barge at around 9 a.m. and saw a red aluminum 20-foot picket boat anchored there, with picket signs and a red ILWU sign. A Tidewater tug was hooked to an empty barge, which it took upriver to a grain elevator. The tug then returned and tried to pick up the barges loaded with CGI grain. The picket boat positioned itself between the tug and the barges. The tug crew did not cross the picket line to pick up the grain.

Late in the morning on October 17, Nelson rode the tug *Betty Lou*, which was dispatched from Tidewater’s moorage in Vancouver to Hayden Island upper to pick up empty grain barge 168 and take it back to Tidewater’s maintenance facility for repair. The barge had last offloaded wheat at Columbia Grain. When he saw an anchored sailboat and a couple of smaller boats around Hayden Island upper, Nelson began videotaping. There were picketers in the boats holding and sometimes waving ILWU signs. As the tug got closer, the picketers yelled for the crew to “Get back”; “Go back”; and “Back it off.”²⁵ They also said, “You ain’t getting in”; and “Turn it around.”²⁶ The crew turned the tug around and went back to the moorage in Vancouver. (GC Exh. 12, video 1; Tr. 221–223, 235.)

On October 18, Nelson rode the tug *Sundial* at around 10:30 a.m. to pick up empty grain barge 168 at Hayden Island upper and take it to Tidewater’s maintenance facility. He made a videotape of the attempt. There were about seven picket boats around Hayden Island upper. As the tug approached, picketers began yelling, though much of it is indecipherable. A picketer said, “This is a bona fide picket line of the ILWU”;²⁷ and “Union organized river.”²⁸ Nelson heard a picketer telling them to go home, go back to dock, and saying they could beat Marubeni corporation.²⁹ The picketers also made a comment about “corporate greed.”³⁰ The captain turned the tug around and they headed back to the moorage in Vancouver. (GC Exh. 12, video 2; Tr. 223–227.)

Another attempt to pick up barge 168 occurred on October 20, when the tug *Betty Lou* was dispatched to Hayden Island upper. Nelson rode along and videotaped their approach. There were six picket boats with ILWU signs. Most of the smaller print could not be read, but one sign said “ILWU Local 8”; “Columbia Grain Locked Out.” Another said, “ILWU Local 4”; and “Shame on Mitsui.” As the tug approached, one of the boats moved in front of it. The picketers began yelling, though much of it is indiscernible. A picketer said “Stand together with your brothers of the ILWU”; “This is a bona fide picket line of the ILWU”; “Turn your boat around”; “Turn your boat around and go back to dock.”³¹ Three boats began moving

¹⁹ In Fletcher and Reed’s view, the tugs were standing by with crews on board. (Tr. 154–157, 303–304.)

²⁰ GC Exh. 11 at 1:41; Tr. 210.

²¹ GC Exh. 11 at 2:46–2:52; Tr. 210.

²² GC Exh. 11 at 2:52–3:04.

²³ Id. at 3:32–3:33.

²⁴ Id. at 5:58–5:59.

²⁵ GC Exh. 12, video 1, at 2:30–2:45.

²⁶ Id., at 3:05–3:15.

²⁷ GC Exh. 12, video 2, at :59–1:02.

²⁸ Id. at 1:13–1:15.

²⁹ The video backs up Nelson’s testimony. Id. at 1:40–1:50.

³⁰ Id. at 1:57–2:00.

³¹ GC Exh. 13 at 2:02–2:23; Tr. 231.

to block the tug's access to the barge. A picketer yelled, "This is a bona fide picket line of the ILWU";³² "This is bullshit. Turn your tug around and go back to the dock;"³³ "Stand together against corporate greed"; "They illegally locked us out of our jobs"; "I just want to go to work."³⁴ The picketers continued to assert that this was a bona fide picket line of the ILWU and instructed the tug to turn around. The tug turned around and went back to the moorage in Vancouver. (GC 13; Tr. 229–233.)

The only barges at Hayden Island upper on October 16, 17, 18, and 20 were grain barges. (Tr. 241–242.)

According to Clark, the Union's goal was to put financial pressure on the companies that locked them out and they only picketed barges that went to CGI and UGC elevators.³⁵ (Tr. 403.) Brant Mullane, a member of Local 4, stated that the focus of the picketing was CGI's facilities and cargo handled at their facilities. (Tr. 358–364, 370.) There was not picketing of barges that off-loaded grain at customers other than CGI and UGC. (Tr. 164, 199, 309–310.)

III. DECISION AND ANALYSIS

A. Respondent's Noel Canning Defense

The Respondent, in its closing brief, asserts that the Notice Of Hearing issued by the Regional Director must be quashed and the complaint dismissed for lack of jurisdiction. Citing to *Noel Canning v. NLRB*, 705 F.3d 490, 506–507 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (2013), and its progeny, the Respondent argues that the Board's actions, including the appointment of the Regional Director in this case, are invalid. The General Counsel filed a motion to strike this defense, contending it was not timely raised in the Respondent's answer or in its opening statement.

The defense was indeed raised for the first time in the Respondent's closing brief, and I therefore find it was waived. See *Approved Electric Corp.*, 356 NLRB No. 45 fn. 1 (2010); *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005). The Respondent contends that the defense is jurisdictional and therefore can be raised at any time, citing *Roosevelt Corp.*, 132 NLRB 248, 255 (1961). That case, however, involved the Board's jurisdiction over an employer based on interstate commerce. (R. Br. 1.) The Respondent also cites to *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), where the Third Circuit held that the statutory mandate for a three-member composition of the Board is jurisdictional. The General Counsel points out that the Eighth Circuit in *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 794–795 (8th Cir. 2013), came to a different conclusion. The General Counsel further cites to the Supreme Court's decision in *City of Arlington v. FCC*, 133 S.Ct. 1863, 1868–1871 (2013), to support its

assertion that the validity of the appointment at issue is nonjurisdictional.³⁶ I note also that the Fifth Circuit, in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351 (5th Cir. 2013), held that "challenges under the Appointments Clause are 'nonjurisdictional structural constitutional objections' that are within a court's discretion to consider" (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878–879 (1991)).

Based on the foregoing, until the Board rules otherwise, I find that the Respondent has failed to prove the jurisdictional nature of its affirmative defense based on the Regional Director's appointment. As it was raised for the first time in the Respondent's closing brief, I find it was waived and decline to consider it.

B. Complaint Allegations

The complaint alleges that the picketing activity beginning on August 19 violated Section 8(b)(4)(i) and (ii)(B) of the Act. Under Section 8(b)(4) it is unlawful for a union to "induce or encourage" anyone engaged in commerce to refuse to "transport, or otherwise handle any goods, articles, materials, or commodities," or to "threaten, coerce, or restrain" anyone engaged in commerce when "an object" of this conduct is to "force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products" of another, "or to cease doing business with any other person." 29 U.S.C. §§ 158(b)(4)(i) and (ii)(B). More simply put, a union may picket primary employers with whom it has labor disputes, "but it runs afoul of Section 8(b)(4) if it pickets a neutral employer with the proscribed object of enmeshing the neutral employer in a controversy not its own." *Oil Workers Local 1-591 (Burlington Northern Railroad)*, 325 NLRB 324, 326 (1998).

The facts are largely undisputed. With regard to the upriver picketing, I credit Olstad's testimony about the picketing activity on August 19 and 23 at the Port of Wilma, as it is undisputed and is consistent with similar picketing activity depicted on videotape. Olstad's testimony about the events of August 23 is also uncontested and is supported by Bartel's testimony, which I likewise credit. As to the downriver picketing that was videotaped, I find the footage to be reliable evidence of what occurred on the dates in question. I also credit testimony from Fletcher, Doerfler, and Nelson, as it is unrefuted and supported by the videotapes. Witnesses for the ILWU, Mullane and Clark, testified that the Union only picketed tugs trying to pick up barges that had transported grain from UGC or CGI. This testimony is likewise credible and consistent with other record evidence.

I find the Respondent engaged in unlawful secondary picketing because it targeted Tidewater, a neutral party. It is undisputed that the primary employers with whom the Union has labor disputes are the grain companies UGC and CGI, and that Tidewater is a neutral party. The Union asserts, however, that the picketing at Tidewater's spud barges and other tie-off locations was lawful because they were a common situs, i.e., a common jobsite where the grain companies and other companies, including Tidewater, maintained a presence.

³² GC Exh. 13 at 3:20–3:22; Tr. 213.

³³ GC Exh. 13 at 3:40–3:44.

³⁴ Id. at 4:17–4:26.

³⁵ Clark stated that if a vessel did not communicate its intentions to the picketers, they would use the picket boats to form a picket line. He also stated that the picketers radioed approaching vessels to ask their intentions. (Tr. 385–387.) The evidence shows that sometimes there was communication between the tug and the picket boats and sometimes there wasn't.

³⁶ Because the General Counsel and Charging Party were not on notice of this defense, I accept the General Counsel's supplemental brief.

The Respondent relies on *NLRB v. Ironworkers Local 443*, 850 F.2d 551, 554 (9th Cir. 1988), for the proposition that a union may picket a primary employer “at a situs under the control of the secondary employer, as long as the picketing is primary in nature.” That case involved construction sites where both the primary employer and the neutral employer performed work. Here, CGI and UGC maintained their own grain facilities where its employees performed grain-handling duties, which did not include operating tugs or towing barges. The spud barges and other tie-offs were owned and controlled by Tidewater, and the grain company employees performed no work there. As such, this case is distinguishable from the *Ironworkers Local 443* and the other cases the Respondent cites involving worksites where employees of both the primary and neutral employer perform work.

For similar reasons, I find the *Moore Dry Dock* criteria on which the Respondent relies do not apply to the instant case. *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950). In *Moore Dry Dock*, the primary employer’s business was “operating tramp ships in worldwide trade” and therefore its ships comprised ambulatory worksites. Here, the grain company workers did not operate tugs or tow barges, and they did not perform work at Tidewater’s facilities. Instead, they performed work at the grain companies’ elevators, which are fixed worksites. Moreover, the picketed Tidewater sites were distinct from CGI and UGC’s grain elevator worksites, with the distances between the grain elevators and Tidewater’s spud barges and other tie-offs ranging from .5 mile to 5 miles. The grain companies were not in such close proximity to Tidewater’s tie-offs to be deemed to have a presence there. I therefore find the picketing was purely secondary. See, e.g., *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686–687 (2001); *Industrial Workers Local No. 657 (Truck Transport, Inc.)*, 245 NLRB 796, aff’d, 659 F.2d 252 (D.C. Cir. 1981); *Carpenters (Gulf Coast Construction)*, 248 NLRB 802 (1980).

The Respondent, in its closing brief, asserts a defense based on the ally doctrine. Specifically, the Respondent contends that Kadoke and JT Marine lost their neutrality and became an integrated straight-line operation with the grain companies.³⁷ (R. Br. 20.) The General Counsel moved to strike this defense, asserting that it was not timely raised in the Respondent’s answer or opening statement. It is true the Respondent did not explicitly plead the ally doctrine as an affirmative defense in its answer. It did plead, however, that “[s]ome or all of the locations where Respondents publicized their labor dispute were extensions of the primary situs.” The Respondent raised ownership and control among Tidewater, the grain companies, and Kadoke and JT Marine during the prehearing conference when discussing subpoena matters, and I note that the parties’ opening statements touched on such matters. (Tr. 14–17, 23, 26, 29–30.) I therefore will consider whether, through the charter arrangements Tidewater entered into with Kadoke and JT Marine, along with the services agreements these entities entered into with the grain companies, as described in the statement of

facts, UGC and CGI’s situs was extended to Tidewater’s tie-off locations on the dates in question.

The Supreme Court has recognized the ally doctrine as defense to an 8(b)(4)(B) charge “where the secondary employer against whom the union’s pressure is directed has entangled himself in the vortex of the primary dispute.” *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612, 627 (1967). Where the General Counsel has established, as here, that the union picketed at locations and during times when the primary employer was not present, “the burden shift[s] to the Respondent to show the existence of the ally relationships it pleads as an affirmative defense.” *General Teamsters Local 959*, 266 NLRB 834, 838 (1983), enf’d. 743 F.2d 734 (9th Cir. 1984). The union bears a heavy burden to establish that an entity has lost its neutrality for purposes of § 8(b)(4)(B). *Service Employees Intl. Union, Local 525, AFL–CIO (The Lenkin Co.)*, 329 NLRB 638, 639 (1999); *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 314 fn. 5 (1991), enf’d. in rel. part 989 F.2d 515 (D.C. Cir. 1993).

When determining whether an entity is neutral under Section 8(b)(4), the Board has articulated versions of a four-factor test through its case law. In *Graphic Arts Local 262 (London Press)*, 208 NLRB 37, 39 (1973), the Board considered the following factors: (1) common ownership of employers involved, (2) common or centralized control of day-to-day operations including labor relations, (3) extent of integration of business operations, and (4) interdependence of employers for a substantial portion of business. Stated slightly differently in *Mine Workers (Boich Mining Co.)*, 301 NLRB 872, 873 (1991), as well as some other cases, the Board looks at: “(1) common ownership, (2) common management, (3) interrelation of operations, and (4) common or centralized control of labor relations.” Regardless of the version, the test is not applied in a formulaic or rigid manner, but rather each situation must be evaluated on a case-by-case basis. *Curtis Matheson*, 248 NLRB 1212, 1214 (1980).

I note at the outset of my ally doctrine analysis that the defense in this case is rather atypical, as the ILWU does not contest Tidewater’s neutrality. Rather than contending Tidewater and the grain companies are allies, the ILWU contends that Kadoke and JT Marine are the grain companies’ allies. As such, the ILWU asserts that the presence at and use of Tidewater-owned tie-offs by some of the vessels Tidewater chartered to Kadoke and JT Marine renders the tie-offs extensions of the grain companies’ situs. The evidence shows, however, that the picketing occurred regardless of the chartered tugs’ presence. It was directed at Tidewater tugs’ attempts to pick up an empty grain barges at Hayden Island upper on several occasions, both before and after the Invader was moored there. It was directed at multiple attempts to pick up empty Tidewater barges to take them to Tidewater’s Vancouver facility for servicing. The picketing was directed at the Tidewater tug Betty Lou’s attempt to pick up empty grain barges at Hayden Island middle despite the absence of the Invader or any Kadoke-chartered vessel at the site. The picketing was directed at Tidewater tugs attempting to pick up barges at the Tidewater’s Wilma tie-off, regardless of whether the Stacy T was present. As the Respondent admits and the videotapes depict, the picketing was targeted at

³⁷ The Respondent does not contend that Tidewater, Kadoke, or JT Marine employees performed struck work.

vessels that had transported grain for UGC and CGI.³⁸ Against this backdrop, I will turn to the factors relevant to the ally defense.

The primary evidence the Respondent relies on in support of its ally defense is the charter and services contracts. As the General Counsel points out, however, many portions of these documents are not explained or given meaning through presentation of “comparative contracts, expert testimony, or any evidence at all.”³⁹ (GC Supp. Br., p. 9.) The services agreement between Kadoke and the grain companies states that Kadoke has the “exclusive right to hire and manage its own crews” without the grain companies’ interference. As such, the Respondent has not shown common or centralized labor relations between the grain companies and Kadoke and JT Marine. The Respondent points out the agreements’ requirement for Kadoke and JT Marine to provide security for the chartered vessels at all times. The fact that JT Marine and Kadoke were responsible for the security of chartered vessels at all locations, including Tidewater’s tie-off locations, does not convert these locations into a situs of the grain companies.

The Respondent cites to *Longshoremen & Warehousemen (Ind.) Local 12 (Irwin-Lyons Lumber Co.)*, 87 NLRB 54 (1949), for the proposition that Kadoke, JT Marine, and the grain companies constitute substantially one enterprise by virtue of common ownership or control. In *Irwin-Lyons*, however, the evidence showed that the primary employer and the alleged neutral employer were owned and managed by the same two families. The Respondent’s argument based on *Henry Wurst, Inc.*, 187 NLRB 490 (1970), is likewise unavailing. In that case, unlike here, members of the same family owned the companies at issue and they were all located in the same building. For similar reasons, the Respondent’s reliance on *J.G. Roy & Sons Co.*, 118 NLRB 286 (1957), and *Teamsters Local 282 (Acme Concrete)*, 137 NLRB 1321, 1324 (1962), is unavailing. Here, the charter and services agreements involving JT Marine and Kadoke do not establish they are owned or managed by the same individuals as UGC and CGI. No other evidence was presented to show common ownership or management. As such, these factors weigh against the Respondent’s burden under the ally doctrine.

The Ninth Circuit considered a case with similar facts in *General Teamsters Local 959, State of Alaska v. NLRB*, 743 F.2d 734 (9th Cir. 1984). There, the primary employer, Anchorage Cold Storage, had a bareboat charter on a barge. The union argued that it could picket the barge because of the Anchorage’s control over it, and by extension could picket a tug owned by the secondary employer, VEDCO. The Court disagreed, stating, “[e]ven if Anchorage owned the barge outright, the union would not therefore be entitled to picket VEDCO. To hold otherwise would be to permit a union to picket any shipper who carried cargo for an employer with whom the union had a

primary dispute.” *Id.* at 738. Following this reasoning, even if UGC and/or CGI owned some of the chartered vessels, the picketing at Tidewater’s facilities of Tidewater-owned tugs runs afoul of the Act’s restrictions on secondary picketing.

While the evidence, particularly the charter and services agreements, shows some integration of operations and dependence of one entity on another for business, I find the evidence is insufficient to carry the Respondent’s heavy burden to prove its defense based on the ally doctrine. See *Newspaper & Mail Delivers’ Union (Gannet Co.)*, 271 NLRB 60, 68 (1984); *Teamsters Local 456 (Carvel Corp.)*, 273 NLRB 516 (1984). Accordingly, I find the Respondent has failed to prove that the grain companies were an integrated straight-line operation with Kadoke or JT Marine. I therefore find, in turn, that Tidewater’s spud barges and other tie-off facilities were not extensions of UGC or CGI’s jobsites, and the picketing at those sites was presumptively secondary.

Having found the picketing was presumptively secondary, I next must determine whether the Union’s objective was primary or secondary. Under Section 8(b)(4)(ii)(B), a union may not “threaten, coerce, or restrain any person engaged in commerce” where the object is to force or require “any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.” This unlawful objective need not be the sole objective. *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 689 (1951). “When a purely secondary boycott ‘reasonably can be expected to threaten neutral parties with ruin or substantial loss’ . . . the pressure on secondary parties must be viewed as at least one of the objects of the boycott or the statutory prohibition would be rendered meaningless.” *Longshoremen Assn. v. Allied International, Inc.*, 456 U.S. 212, 226 (1982), quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 614 (1980).

It is clear the picketing activity was aimed at coercing Tidewater to cease doing business with CGI and UGC. As Judge Aiken found, the picketing targeted “Tidewater employees at Tidewater spud barges” when they attempted to transport grain. The evidence before me is even more convincing, as it shows Tidewater employees and tugs were targeted even in attempts to transport empty grain barges. Moreover, the picketers threatened Tidewater employees. On one occasion, their message focused on the Japanese ownership of the grain companies and their use of scab labor during the walkout, and was immediately followed by the outright threat, “They’re coming after you next.” The picketers on another occasion yelled, “They illegally locked us out. What are they going to do to you next?” These statements were plainly coercive and threatening.

Further, as Judge Aiken pointed out, the ILWU does not deny that it ceased its picketing activity when Tidewater tugs are not present and resumed it when a Tidewater tug attempted to pick up a barge. The evidence indeed proves this, and also shows aggressive maneuvering aimed solely at Tidewater tugs that is unquestionably coercive and restraining. Clearly, the intent of the picketing was for Tidewater to cease transporting UGC and CGI’s grain.

³⁸ Though some of the empty barges were likely still bareboat chartered when the Tidewater tugs came to retrieve them, Kadoke and JT Marines’ work had been performed, and once a Tidewater tug hooked up to the barge, Tidewater would regain possession and control.

³⁹ The Respondent submitted agreements between Tidewater and CGI into evidence.

Based on the foregoing, I find that the General Counsel has met its burden to prove the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondents are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (the Act) and the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By engaging in secondary picketing at Tidewater's facilities, the Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act.

3. The violations found to have been committed in this case affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that the Respondents engaged in unlawful secondary picketing, I shall recommend that the Respondents be ordered to cease and desist from threatening, coercing, or restraining Tidewater in any manner or by any means, including picketing, where in any case an object thereof is to force or require Tidewater to refuse to perform services and/or cease handling, transporting, or otherwise dealing in the products of, or to cease doing business with UGC or CGI.

The Respondents shall be required to post a notice as set forth in the recommended Order below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

ORDER

The Respondents, its officers, agents, and representatives, shall

1. Cease and desist from threatening, coercing, or restraining Tidewater in any manner or by any means, including picketing, where in any case an object thereof is to force or require Tidewater to refuse to perform services and/or cease handling, transporting, or otherwise dealing in the products of, or to cease doing business with UGC or CGI.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region,⁴¹ post at its business offices and meeting halls copies of the attached notices marked "Appendix." Copies of the notices, on forms provided by the Regional Director for Region 19, after being

signed by the Respondent's authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. April 25, 2014

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT threaten, coerce, or restrain Tidewater Barge Lines, Inc., in any manner or by any means, including picketing, where an object thereof is to force or require Tidewater to refuse to perform services and/or cease handling, transporting, or otherwise dealing in the products of, or to cease doing business with UGC or CGI.

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION
LOCAL 4 AND LOCAL 8

⁴⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."